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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1964

JOSEPH A. GARGANO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The charge here is one of conspiring to facilitate the illegal importation of drugs. It is important to note that this is an importation case, brought under the Importation Act, not a sales case, nor a general drug trafficing case. The appellant's position is simply this: There never was a conspiracy to import anything and there never was any importer with which to conspire. The whole plan was carried out, on the "importing" end by agents of the Customs Service 6

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No. ———

JOSEPH A. GARGANO,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Joseph A. Gargano[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on December 11, 1964 in a proceeding entitled United States of America, Plaintiff-Appellee v. Joseph A. Gargano, Defendant-Appellant, Appeal from the United States District Court for the Southern District of Ohio, Western Division.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is printed as Appendix hereto. It has not yet been officially reported.

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[1] Referred to herein as "petitioner" or "defendant."

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered December 11, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. #1254 (1) and 28 U.S.C. Supreme Court of the United States Revised Rules, Rules 21, 22 and 23.

QUESTIONS PRESENTED

I. If the charge is conspiring to facilitate illegal importation, and if there is no showing as to the "conspiring importer" and if that "conspiring importer" is in fact an agent of the United States, can there be any "conspiracy to facilitate" when there was never any real conspiracy to import?

II. The alleged participation by defendant was at its worst, specifically conditioned upon goods having been imported. But no goods ever were imported, or ever were intended to be imported. Is such conditional "involvement" an actual illegal involvement?

III. There was no plot to import drugs, and there was no principal. If nothing could have been sent or received illegally, can there be a conspiracy to "facilitate"?

IV. The present case is distinguishable, both in principle and in fact, from those cases which hold it is possible to have conspiracy considered as a crime by itself.

V. Even if the United States were not the "co-conspirator" when there is no evidence of possession of an illegally imported drug, which admittedly would permit presumption of knowledge that it was imported, is it not necessary for the government to prove that the accused had knowledge that the drug was illegally imported?

VI. Did the defendant receive an equitable sentence considering his relation to the alleged conspiracy, the sentences and the motivation of his accusers?

STATEMENT

This petition seeks review of a Judgment of the United States Court of Appeals for the Sixth Circuit affirming a Judgment of the United States District Court for the Southern District of Ohio, Western Division.

The defendant Joseph A. Gargano was indicted along with John P. Radican, Arlie C. Bush, William J. Van Detti and Nick Iacobucci September 28, 1962 for violation of Section 174, Title 21 of the United States Code.

The charges were dismissed against Radican and Iacobucci (App. 2a-4a). Bush pled guilty (Record 3) and Van Detti went to trial with Gargano who was found guilty. Bush, who testified against Gargano — as did Radican — was sentenced to five years. Gargano was sentenced to ten years.

Radican introduced himself to Gargano in Newport, Kentucky where Gargano worked in a gambling house in November of 1960 (App. 33a) and discussed gambling with him. This was also the sole subject of two phone calls from Radican to Gargano. Narcotics were not mentioned by Radican until a third call from Radican (App. 34a), whereupon Gargano told him not to call him again (App. 36a) that he, Gargano, didn't want to have anything to do with it (App. 36a). Radican in his testimony in chief confirms Gargano's refusal to have anything to do with it. From this point the story separates into two versions: Radican claims Gargano put him in touch with Bush so Bush could help Radican dispose of future narcotics if and when they arrived. Gargano insists he introduced Bush to Radican to discuss gambling because Bush was a professional gambler and open gambling in Newport was closing. Gargano did admit on cross examination that he told Radican he'd try to find somebody to help him (Radican) "to get him off my back."

It is agreed that all three met in Gargano's car on March 13, 1962. But here again the two versions differ. Gargano says (App. 40a) that when Radican produced a letter purporting to be from one John Spilman, a soldier in Korea, with whom he had been in prior correspondence, in which the word "heroin" was used, Gargano said "You are both crazy" and then Gargano left the car and went into a nearby drug store. Radican says Gargano remained. There is agreement this is the last time Radican and Gargano met. In the Radican version Bush agreed that "in the event that any heroin did come into the country I was to contact Mr. Gargano by telephone and to telephone Mr. Gargano in Cincinnati and they would get hold of Mr. Bush and he said if I did get anything that I should refer to it as a pair of pants" (App. 18a).

On the date of this meeting, March 13, 1962, Radican wrote Spilman (Pl. Exhibit 2) not knowing that Customs Agents were already in the picture in Korea, directing the correspondence, and in fact were in contact with Spilman on the very day of the meeting of Radican, Bush and Gargano (App. 47a); Radican did not know this and he received a letter allegedly from Spilman stating that a Mr. Joseph Martin would call on him in the near future (App. 24a). Joseph Martin was actually Garry D. Lining, Customs Agent, assigned to the Cleveland office (App. 48a) who was to identify himself, according to instructions that Spilman gave Radican, by showing half of a torn picture of Spilman (App. 24a). When the alleged Joseph Martin did contact Radican, Radican claims he phoned Gargano — to inform Bush. Bush then called back Radican three times. Bush, who had given Radican $240 (App. 29a) while passing through Cincinnati phoned Gargano — who had given no money (App. 22a) and asked Gargano to go with him to the Dayton rendezvous. Gargano refused, staying home with his children (App. 28a). Bush went on

to meet Radican and the Customs Agent using the name Joseph Martin — and was thereupon arrested that night, on July 11, 1962.

No narcotics were involved in the meeting because Agent Lining (alias Joseph Martin) had none (App. 49a). No narcotics were ever involved at any time nor was there any real conspiracy to import because the alleged "importer" was the United States itself. Forty-eight days later Gargano was indicted and arrested. At his trial Radican and Bush testified against him as the sole Government witnesses.

DECISION OF THE COURT OF APPEALS

The Sixth Circuit Court of Appeals by order dated December 11, 1964, affirmed the judgment of the District Court, drawing a distinction between a substantive offense and a conspiracy. When it was pointed out in the Petition for Rehearing that such distinction was readily admitted but that it was the essence of this defense that here there never was a substantive offense and never was a conspiracy — since the necessary "other party" was the United States itself — the petition was denied without any comment upon this point whatsoever.

It is the contention of this Petition in this Court that the central proposition of this defense has never been considered up to this point; namely, there cannot be a conspiracy to facilitate importation of illegal drugs when no importing conspirator existed — when no such conspirator was revealed, when no testimony was received from said alleged conspirator and when that necessary party was in fact the United States of America, acting through an agent of the Customs Service.

REASONS FOR GRANTING THE WRIT

The Petitioner states that he has been deprived of his constitutional right to a fair and impartial trial because he was forced to face a trial for conspiring to facilitate a conspiracy, the conspiracy to illegally import drugs, when no such conspiracy ever existed — the United States, through its agents being the undisclosed "conspirator" on the other end of this alleged conspiracy.

Petition further states that because of the foregoing he will be deprived of his liberty without due process of law, all in violation of the Fifth Amendment to the United States Constitution.

ARGUMENT I.

THE CHARGE HERE IS ONE OF CONSPIRING TO FACILITATE THE ILLEGAL IMPORTATION OF DRUGS. IT IS IMPORTANT TO NOTE THAT THIS IS AN IMPORTATION CASE, BROUGHT UNDER THE IMPORTATION ACT, NOT A SALES CASE, NOR A GENERAL DRUG TRAFFICING CASE. THE APPELLANT'S POSITION IS SIMPLY THIS: THERE NEVER WAS A CONSPIRACY TO IMPORT ANYTHING AND THERE NEVER WAS ANY IMPORTER WITH WHICH TO CONSPIRE. THE WHOLE PLAN WAS CARRIED OUT, ON THE "IMPORTING" END BY AGENTS OF THE CUSTOMS SERVICE.

The United States cannot conspire to break its own laws. Furthermore, this matter of governmental agents acting as the necessary "other party" has been clearly scored in many cases. *De Mayo* v. *United States,* Circuit Court of Appeals, Eighth Circuit, 32 Fed. 2d 472 discusses these cases and is authority for the principle "Conspiracy: Neither Conspiracy nor the substantive offense can be made out by unaided overt acts of government officer incompe-

tent to conspire. Neither the case of conspiracy nor the substantive offense of introducing liquor into forbidden territory by unaided overt acts of government officers incompetent to enter into the conspiracy."

Here government agents controlled the baited letters, introduced their man as go-between, and finally had him complete the contact.

ARGUMENT II.

THE ALLEGED PARTICIPATION BY DEFENDANT WAS, AT ITS WORST, SPECIFICALLY CONDITIONED UPON GOODS HAVING BEEN IMPORTED. BUT NO GOODS EVER WERE IMPORTED, OR EVER WERE INTENDED TO BE IMPORTED. IS SUCH CONDITIONAL "INVOLVEMENT" AN ACTUAL ILLEGAL INVOLVEMENT?

Radican (App. 18a):

> "In the event that any heroin did come into the country, I was to contact Mr. Gargano by telephone and to telephone Mr. Gargano in Cincinnati and they would get hold of Mr. Bush and he said if I did get anything that I should refer to it as a pair of pants."

Bush (Record page 77):

> "Q. What did Joe Gargano say, if anything, to either of you or to the boy from Dayton while you were in the automobile? A I don't remember of any more that he said except he told Radican that after, if he did get the narcotics delivered to him, that he could contact me through him by calling him."

Not only did Radican never get anything, but no one even sent anything. Therefore, it is submitted that a conditioned agreement to perform an act after certain things were done, and these things were never done, could not have been done and were never intended to be done,

i.e., send drugs from Korea—, such is not in conformity with the statute which says:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drugs after being imported or brought in, *knowing the same to have been imported or brought* into the United States contrary to law, *or conspires to commit any of such acts* in violation of the laws of the United States . . ."

The words "such acts" in the conspiracy clause can refer only to the acts set forth in the earlier part of the sentence . . . and those acts are all described in the past tense and indicative mood, as something which has actually happened — there is no use either of a future tense nor of a subjunctive or conditional mood. *"After being imported or brought in"* clearly indicates that something has already happened as does *"knowing the same to have been imported or brought in."*

ARGUMENT

THERE WAS NO PLOT TO IMPORT DRUGS, AND THERE WAS NO PRINCIPAL. IF NOTHING COULD HAVE BEEN SENT OR RECEIVED ILLEGALLY, CAN THERE BE A CONSPIRACY TO "FACILITATE"?

This case goes beyond the absence of narcotics although that is clear enough from the Government testimony.

Bush (Record page 134):

> "Q. This Government man didn't deliver any in your presence, did he? A He didn't deliver any to me, no. Q Did you see him deliver any to Radican? A No."

Radican (App. 25a), in referring to the Customs Agent who posed as the delivery agent for Spilman, the man in Korea:

> "Q Did you ever see these narcotics? A No, sir. Q Did you ever see any narcotics at all? A No, sir."

Clifton Mentzer, the Customs Officer in charge of the operation and the superior of Agent Lining, the undercover Customs Agent posing as the importer (App. 49a):

> "Q Did Mr. Lining actually have any narcotics in his possession when he was in the Motel room? A He did not."

Finally, Mr. Kinneary, the United States District Attorney (App. 32a) openly admitted that there was no narcotic importation, citing the *Agueci* case, 310 F.2d 817, which we shall consider further on.

No narcotics were seen in this case because none were imported and none were imported because there never was a plot to import. This is what takes this case beyond mere absence of narcotics and beyond any of the cases cited. On March 13, 1962, the very day the alleged conversation took place in the automobile in Kentucky, Spilman, in Korea, was already in contact with the Customs Agents. Mentzer (App. 47a). This, of course, Radican did not know.

Radican (App. 23a):

> "When you speak of Joseph Martin, the United States Customs Agent, you say you talked to Gargano and Bush and told them this man was there to deliver the narcotics; is that right? A Yes, sir. Q When did Joseph Martin some into this scene? (App. 24a) A When I received a letter from John Spilman stating that a Mr. Joseph Martin would call on me in the near future. Q In other words, Spilman told you that Joseph Martin would call on you in the near future? A Yes, sir. Q And then Joseph Martin.

did he subsequently call on you? A Yes, sir. Q And he finally turned out that he was a United States Customs Agent, isn't that right? A Yes, sir."

What makes this situation different from other cases which set out the perfectly proper doctrine that a conspiracy is now a separate crime is simply this: Here there was no plot, no principal, no importation or conspiracy which failed – nothing, in fact, beyond the deception which the Customs Agent worked on Radican. Certainly the Government must have had its own misgivings along these lines or else why did it agree to a Nolle Prosequi on the importation conspiracy against Radican? Ironically and inequitably it left unfortunate Gargano stuck with the original charge, although by even the strictest view, he was further removed from this trick than was Radican, the deceived "instigator." In short, how can Gargano have been a "facilitator" when there was nothing to facilitate?

ARGUMENT IV.

THE PRESENT CASE IS DISTINGUISHABLE, BOTH IN PRINCIPLE AND IN FACT, FROM THOSE CASES WHICH HOLD IT IS POSSIBLE TO HAVE CONSPIRACY CONSIDERED AS A CRIME BY ITSELF.

Let us begin with the case cited by the District Attorney to the Court at Page 153, *United States of America* v. *Vito Agueci, et al.*, 310 F.2d 817 (1962) United States Court of Appeals, Second Circuit. The facts in that case clearly showed a wide-scale series of importation of drugs in false bottom suitcases of Italian immigrants. The principle, furthermore, in syllabus 1 recognizes two important factors ignored in this present case.

"Instruction on conspiracy to violate the federal narcotic laws was not inadequate in regard to scienter,

where it was pointed out in the instruction that the jury would have to find that it was part of the conspiracy to unlawfully import narcotic drugs or receive, conceal, or sell narcotic drugs *after they had been imported* into the United States *knowing they had been brought into the United States illegally.*"

The *Agueci* case which we shall now consider cites three other cases, the *Poliafico* case, the *Braverman* case and the *Pereira* case.

Poliafico v. *U. S.*, 237 F.2d 97 (6th Circuit 1956), 352 U.S. 1025, 77 S. Ct. 590; 1 L. Ed. 2d 597 (1957)

In the language of the Court:

"All of the appellants were either selling heroin to Poliafico or his associates or selling it for them or carrying on negotiations for such sales or making payment therefor or delivering heroin for resale or reselling it."

This is a very different picture than an alleged conditional "facilitation," if the drugs ever arrived, under a set of facts where the Customs Agents were already in control and no drugs, therefore, ever could — or did — arrive, or even be sent.

Braverman v. *U. S.*, 317 U.S. 49, 63 S. Ct. 99; 87 L. ed 23 (1942)

Mr. Chief Justice Stone sums up the facts herein as follows:

"On the trial there was evidence from which the jury could have found that for a considerable period of time petitioners, with others, collaborated in the transportation and distribution of distilled spirits, involving the violation of the statute mentioned in the several counts of the indictment."

Here, we need hardly point out, there was no evidence of anyone violating the statute with whom this petitioner could collaborate, since the only "others" were Customs Agents.

Pereira v. *U. S.*, 347 U.S. 1, 74 S. Ct. 358; 98 L. ed 435

The facts herein are summarized in the headnote in 98 L. ed. 435, part of which follows:

> "The defendants in close association, engaged in a fraudulent scheme to obtain money from a woman, whom one of the defendants married and left after the purpose of the scheme was accomplished . . ."

These facts distinguish themselves.

In none of these cases did a Federal agent pose as a principal in a non-existent plot; in all of these cases an actual illegal act was committed.

Other cases, which on first impression may seem to give support for what was done in this case, upon examination clearly give no such support. Thus, *U. S.* v. *Shakelford*, 180 Fed. Supp. 857, DCNY 1957, does point out:

> "Since the inclusion of the words 'or conspires' in the Harrison Act, Section 7237(a) of Title 26, and the Jones Miller Act, this section, a conspiracy to violate such laws is now a crime arising under such statutes and an indictment to violate such laws need not refer to the general conspiracy statute, section 371 of Title 18."

The position of the petitioner herein does not try to relate or refer to anything outside the requirements of the very statute he is charged with violating – and he certainly objects to having himself related to a fictional "plot" that never began.

Likewise, *Gardner* v. *U. S.*, 202 Fed. Supp. 256, holds that it is unnecessary that an overt act be alleged for conspiracy, but there it was shown that four ounces of heroin were actually involved and so charged. *Britton* v. *U. S.*, 60 F. 2d 772, holds execution of conspiracy to receive unlawfully imported morphine need not be shown to establish conspiracy — but there 18 ounces of morphine hydrochloride, in small separate tins, were involved.

ARGUMENT V.

EVEN IF THE UNITED STATES WERE NOT THE "CO-CONSPIRATOR" WHEN THERE IS NO EVIDENCE OF POSSESSION OF AN ILLEGALLY IMPORTED DRUG, WHICH ADMITTEDLY WOULD PERMIT PRESUMPTION OF KNOWLEDGE THAT IT WAS IMPORTED, IS IT NOT NECESSARY FOR THE GOVERNMENT TO PROVE THAT THE ACCUSED HAD KNOWLEDGE THAT THE DRUG WAS ILLEGALLY IMPORTED?

Keeping in mind always that in this case there *was* no principal, no narcotics, and no illegal act of importation, either actual or possible, on which to base, or even impute knowledge, the following cases indicate the requirements for a conspiracy conviction of a "facilitator" when the elements missing here did exist, that is, when there was a possibility to import.

In *United States* v. *Santore*, 290 Fed. 2d 51, Circuit Judge Friendly — bottom of page 81, states:

> "It is plain that (one of the defendants) Tarlentino, never had possession of the narcotics and the government was thus obliged to present evidence sufficient to support an inference that he knew the narcotics had been 'imported or brought into the United States contrary to law.' The statute cannot be deemed sat-

> isfied by showing only that a defendant knew he was aiding a narcotic transaction, since such a reading would give no effect to the words 'knowing the same to have been imported or brought into the United States contrary to law' and would render the paragraph as to the evidentiary effect of possession largely superogatory."

In this same case at page 77, Judges Clark, Waterman and Friendly held that:

> "Congress required knowledge of illegal importation as a condition for conviction of any importer, receiver, concealer, purchaser, or seller of narcotics and to hold one guilty of aiding and abetting he must be shown to have shared the same knowledge or intent as is required of the principal. To us, however, this seems to be an oversimplification. By reason of the statutory presumption Congress has, in effect, said that to be found guilty a defendant must be shown to have had either knowledge or unexplained possession." (See footnote page 78)

Judge Waterman says:

> "No lesser proof is required to convict the principal named in the statute i.e., receivers, concealers, purchasers or sellers than is required to convict a facilitator. All we hold is that the unexplained possession of one of these principals may be attributed to a knowing aider and abettors but not a facilitator. Thus the prosecution of a facilitator places the same burden on the government as the prosecution of the principal."

In *United States* v. *Butler,* 204 Fed. Supp. page 339 (see last paragraph page 344), District Judge Palmer, said:

> "Thus to establish the crime defined by section 174 the Government must show illegal importation. To establish an attempt the Government need prove neither illegal importation, but it must show the

defendant believed the narcotics were illegally imported, that is, that he acted with the purpose of purchasing illegally imported narcotic drugs. Here the Government has submitted no evidence to establish that it was defendants purpose or that he believed he was about to purchase illegally imported drugs . . . the drugs could have been domestically cultivated.
"The Government contended that if knowledge of illegal importation is required, the evidence submitted was sufficient to give rise to such an inference.
"Assuming the statutory inference applicable to prosecution under section 174 applies to prosecution under 1403, it would not alter the decision in this case because presumption can only be involved if the defendant had actual possession or constructive possession evidenced by some measure of control over the narcotics." U. S. V. Sanford, 290 Fed. 2d 51.

United States v. *Koch,* 113 Fed. 2d 982. In prosecution against defendant purchasing large quantity of cocaine from third person at fixed price, for conspiracy to import and dispose of narcotics, government must show that defendant in some way knowingly associated in an unlawful common enterprise to import drugs and dispose of them unlawfully and a mere showing that defendant purchased 170 ounces of cocaine at a fixed price per ounce from a third person was insufficient.

In prosecution for conspiracy to import and dispose of narcotics, refusal to charge that there was no proof that defendant knew that drugs had been imported into the United States from Canada or that defendant was connected with conspiracy to so import drugs, was reversible error.

Robinson v. *United States,* 262 Fed. 2d 646 — A person is not an accessory before the fact unless there is some sort of active proceeding on his part. He must incite, or procure, or encourage the criminal act or assist or enable

it to be done, or engage or counsel, or command the principal to do it.

Where Robinson gave one of the conspirators the telephone number of a known dealer, it was held that this was insufficient to be called a facilitation.

Torres Marting v. *United States,* 220 Fed. 2d 740 — To make out offense under Section 174, Title 21, U.S.C.A., it is necessary to establish both that the drugs had been illegally imported and that defendant had knowledge of that fact.

United States v. *Hernandez,* 290 Fed. 2d 86 — Because the aider and abettor must have some knowledge and intent required of principal, proof of knowledge of illegal importation of narcotic drugs is necessary to conviction for aiding and abetting the crime of receiving, concealing, buying or selling any narcotic drug which defendant knows was illegally imported into the United States.

ARGUMENT VI.

DID THE DEFENDANT RECEIVE AN EQUITABLE SENTENCE CONSIDERING HIS RELATION TO THE ALLEGED CONSPIRACY, THE SENTENCES AND THE MOTIVATION OF HIS ACCUSERS?

RADICAN, the self-styled instigator, had the charge which Gargano faced dropped. He was the one who wrote to Spilman in Korea and started the whole train of events. He admitted (App. 27a) that he told the Government he was going to testify against Gargano on the very day the charge against him was dropped; and, furthermore, he admitted (App. 28a) that he was testifying against Gargano because the charge against him had been dropped.

BUSH, who admitted to having been convicted of armed robbery, was the man who assumed the role of disposing of

the drugs if they arrived, and the man who gave Radican money. He testified after pleading guilty, *but before sentence*. He received five years. Gargano, a man who has never been arrested before, who has six children, and supports a family of nine, who, by Radican's repeated admissions, rebuffed his overtures and stated he wanted no part of it, received ten years.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

February 12, 1964

Before: MILLER and CECIL, Circuit Judges, and McALLISTER, Senior Circuit Judge.

This cause is argued by ..... for defendant-appellant and by ..... for plaintiff-appellee, and is submitted to the Court.

JUDGMENT

(Filed December 11, 1964.)

Appeal from the United States District Court for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

s/ SHACKELFORD MILLER, JR.
United States Circuit Judge

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

No. 15411

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH A. GARGANO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Ohio, Western Division.

Decided December 11, 1964.
Filed December 11, 1964.

Before: MILLER and CECIL, Circuit Judges, and McALLISTER, Senior Circuit Judge.

MILLER, Circuit Judge. The defendant, Joseph A. Gargano, along with co-defendants, John P. Radican, Arlie C. Bush, William J. Van Detti and Nick Iacobucci, were indicted for unlawfully conspiring to commit an offense against the United States, namely, to fraudulently and unlawfully import and facilitate the transportation of a narcotic drug into the United States, in violation of Section 174, Title 21, United States Code.*

* Section 174, Title 21, provides: "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000."

The charges were dismissed against Radican and Iacobucci after Radican had pleaded guilty to an indictment under Section 1403, Title 18, United States Code, a related offense involving the same circumstances as in the present case. Bush entered a plea of guilty. Gargano and Van Detti entered pleas of not guilty. The jury returned a verdict of guilty against Gargano and a verdict of not guilty against Van Detti. Gargano received a sentence of ten years and Bush received a sentence of five years. Gargano has taken the present appeal.

The Government introduced only two witnesses, Radican and Bush. There were only two witnesses for the defendant, namely Gargano, himself, and a customs agent, who, however, did not testify as to the merits. The Government's evidence, which was denied in part by Gargano, showed the following. Radican, a student at the University of Dayton, met Gargano in November 1960 at the Yorkshire Club, a gambling house in Newport, Kentucky, where Gargano was employed as a floor manager. In late 1960 or early 1961 Radican got in some kind of trouble in Newport and contacted Gargano to help him. In May 1961 Radican, while in Cincinnati, telephoned Gargano at his home and asked him if there were any places to do some gambling. Gargano told him that everything was shut down. There is no dispute about the fact that in these three conversations there was nothing said about narcotics.

About early March 1962 Radican phoned from Dayton to Gargano in Cincinnati and told him that he "had a source of white stuff" and asked Gargano if he knew what he was talking about. Gargano said that he did, but that he didn't want anything to do with it at that time, that he never dealt in narcotics and didn't want to deal in them. Radican asked Gargano if he knew anybody that did. Gargano said that he would try to get hold of someone if Radican was seriously interested in it, but he didn't want

anything to do with it himself. Radican phoned Gargano again some days later, at which time Gargano said he didn't have anyone as yet. Radican called Gargano again in three or four days and Gargano told him that the person who was interested would give Radican a call.

On March 13, 1962, Gargano phoned Radican to meet him about 4:00 or 4:30 P.M. at Seventh and Scott Streets in Covington, Kentucky. Radican kept the appointment and met with Gargano in Gargano's car. Gargano brought the co-defendant Bush with him and introduced him to Radican as "Al" without using any last name, as previously agreed on by Gargano and Bush. Radican showed Gargano and Bush a letter from a soldier named John Spilman in Korea. The letter referred to a "little deal" of some time previously, stated that he (Spilman) had located a good source and was willing to go along with Radican and made inquiry about the amount to be handled and details "about the set-up." Spilman said in the letter that he thought heroin was the best bet and that he could get it in bulk form and about 90% pure. At this meeting arrangements were made among the three of them for Bush to take care of any heroin that Radican could get into the country, that Radican was to contact Gargano by telephone if he got any heroin into the country, and, in turn, Gargano would contact Bush. Gargano did not like the use of the word "heroin" in the letter and told Radican to refer to it thereafter as a "pair of pants."

Gargano, in testifying in his own behalf, admitted receiving the telephone call from Radican asking him if he knew anybody who would be interested in disposing of the narcotics and that he told Radican that he would see what he could do for him, but he said that he had no intention of doing so and said what he did to stall him off and in the hope that Radican would forget about it and leave him alone. Gargano also admitted that he picked up Bush

in his automobile on March 13, 1962, and took him to the meeting with Radican in Gargano's car, but stated that when he saw the word "heroin" in Spilman's letter, he didn't read the letter, and told Radican and Bush that they were both crazy and that he was leaving. He testified that he then left the automobile, went into a drug store, and took no part in the ensuing discussion. Both Radican and Bush testified that Gargano at no time left the automobile.

About June 1, 1962, Radican phoned from Dayton to Gargano in Cincinnati that he needed money to send to Korea to pay for heroin. Gargano said that he would contact Bush and see what he could do. Gargano contacted Bush and requested him to give Radican $200.00 or $300.00. Gargano said he would stand good for it. Bush sent Radican $240.00, $200.00 of which Radican sent to Spilman in Korea.

About July 11, 1962, Radican called Gargano from Dayton and told him that a man called "Joseph Martin" was in town and had "the pants" with him, which was the term the parties had agreed to use in referring to heroin, and wanted to speak to the parties from Covington and Newport. Gargano contacted Bush by telephone, told him that the package had arrived, and to call Radican, giving him Radican's telephone number. Bush telephoned Radican and arranged to meet him at 11:30 P.M. that evening in Dayton. Bush drove to Dayton from Newport, Kentucky, stopping at Cincinnati on the way in an effort to get Gargano to go with him. Gargano said he was not able to go because his wife was out and he was taking care of the children at the time. Bush met Radican at the Biltmore Hotel in Dayton. Radican and Bush then proceeded to a motel in Dayton, where, after a conversation with a person named "Joseph Martin," they were arrested. "Martin" was an undercover agent of the United States Customs,

using an assumed name. It is admitted that no heroin was found at that meeting.

The Government did not prove and does not contend that any narcotic drug was brought into the United States by Spilman, Radican, Bush or Gargano.

Viewing the foregoing evidence in the light most favorable to the Government, it seems clear that if actual importation of a narcotic drug into the United States is not necessary to constitute the offense charged, there was sufficient evidence to take the case to the jury and that it was not error on the part of the District Judge to overrule appellant's motions for a judgment of acquittal made at the close of the Government's case and at the conclusion of all the evidence.

Appellant's main contention, presented in several different ways in his Statement of Questions Involved, is that he is not guilty as a matter of law of knowingly importing any narcotic drug into the United States or of conspiring to commit any such act, contrary to the provisions of Section 174, Title 21, United States Code, because it appears as an undisputed fact that no narcotic drug was actually imported into the United States by the appellant or any of his co-defendants. We find no merit in this contention.

If the indictment charged the commission of the substantive offense of knowingly importing a narcotic drug into the United States, the contention would obviously have merit. It will be noted, however, that the statute is double barreled. It not only prohibits the substantive offense of importing a narcotic drug into the United States, but, also, in the alternative by the use of the word "or" prohibits a conspiracy to commit the substantive offense. The indictment in the present case does not charge the commission of the substantive offense, but, on the contrary, charges a conspiracy to commit the substantive offense.

It is settled law that a conspiracy to commit an offense

can be made a separate offense from the commission of the substantive offense itself. *Pinkerton* v. *United States,* 328 U.S. 640, 643; *Callanan* v. *United States,* 364 U.S. 587, 593,*rehearing denied,* 365 U.S. 825; *United States* v. *Agueci,* 310 F(2) 817, 828, C.A. 2nd, *cert. denied,* 372 U.S. 959.

It is also settled law that the conspiracy agreement is punishable, even though the contemplated crime is not consummated. *United States* v. *Bayer,* 331 U.S. 532, 542, *rehearing denied,* 332 U.S. 785; *Goldman* v. *United States,* 245 U.S. 474, 477; *Frankfeld* v. *United States,* 198 F(2) 679, 684, C.A. 4th, *cert. denied,* 344 U.S. 922, *rehearing denied,* 345 U.S. 913; *Hanford* v. *United States,* 231 F.(2) 661, 662, C.A. 4th; *United States* v. *Sykes,* 305 F(2) 172, 176, C.A. 6th, reversed on other grounds, sub nomine, *Preston* v. *United States,* 376 U.S. 364.

Appellant also contends that the Government failed to prove the necessary element of intent. He relies upon the testimony of the co-defendant Radican, testifying as a Government witness, in which he said that when he first contacted Gargano about helping him dispose of the "white stuff" which the witness could procure, Gargano told him that he never dealt in narcotics, that he didn't want to deal in them, and that he didn't want anything to do with narcotics. It is argued that the Government is bound by the testimony of its own witness, Radican, which expressly negatives intent. Appellant's reliance upon such isolated statements of the witness Radican is too narrow to support his contention. This same witness also testified that when he first contacted the appellant he stated that he didn't want to have anything to do with it "at that time." He also testified about the actual participation of the appellant later in furtherance of the alleged conspiracy. The testimony of this witness in its entirety strongly supports the existence of intent rather than constituting a denial

of intent on the part of the appellant. *Ryan* v. *United States*, 99 F(2) 864, 868, C.A. 8th, *cert. denied*, 306 U.S. 635; *rehearing denied*, 306 U.S. 668.

Appellant contends that his sentence of 10 years was inequitable and unfair when considered in the light of the sentence of 5 years received by Bush, who had a previous conviction for armed robbery. The matter of the imposition of sentences is solely within the province of the trial judge so long as they are within the statutory limit set by Congress. *Costner* v. *United States*, 271 F(2) 261, 263, C.A. 6th, *cert. denied*, 362 U.S. 952; *DeMars* v. *United States*, 254 F(2) 594, C.A. 6th; *Shaw* v. *United States*, 151 F(2) 967, 971, C.A. 6th. Under this well recognized rule it has been held that a defendant has no valid ground of complaint solely because a co-defendant receives a more favorable sentence than he. *United States* v. *Mann*, 108 F(2) 354, 356, C.A. 7th; *Dillon* v. *United States*, 113 F(2) 334, 339, C.A. 8th, *cert. denied*, 311 U.S. 689. However, it was held in *United States* v. *Wiley*, 278 F(2) 500, 503, C.A. 7th, that in an exceptional case, where the facts point convincingly to the conclusion that the district court has, without any justification, arbitrarily singled out a minor defendant for the imposition of a more severe sentence than that imposed upon the co-defendants, the appellate court has the power to correct the disparity in the exercise of its supervisory control of the district court in aid of its appellate jurisdiction. See also: *Yates* v. *United States*, 356 U.S. 363, 366-367; *Livers* v. *United States*, 185 F(2) 807, 809, C.A. 6th; *Bozel* v. *United States*, 139 F(2) 153, 156, C.A. 6th, *cert. denied*, 321 U.S. 800, *rehearing denied*, 322 U.S. 768. In the present case the evidence was to the effect that the appellant was a principal conspirator, and in fact the one who brought Bush, his co-defendant, into the conspiracy.

We find no arbitrary abuse of the sentencing power in the present case.

We find no merit in appellant's complaint about the instructions to the jury. In addition to the fact that no objection was made at the time, as required by Rule 30, Rules of Criminal Procedure, we do not find any prejudicial error. *Rule 52 (a), Rules of Criminal Procedure.*

The judgment is affirmed.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

No. 15,411

(CAPTION OMITTED)

Order Denying Petition for Rehearing.
(Filed January 14, 1965.)

BEFORE: MILLER and CECIL, Circuit Judges, and McALLISTER, Senior Circuit Judge.

Appellant's petition for rehearing having been considered by the Court;

IT IS ORDERED that said petition be and is denied.

Entered by Order of the Court:

CARL W. REUSS
Clerk, U.S. Court of Appeals

CERTIFICATE OF CLERK

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

I, Carl W. Reuss, Clerk of the United States Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the appendices and proceedings in the case of United States of America vs. Joseph A. Gargano, No. 15,411, as the same remains upon the files and records of said United States Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 8th day of February, A.D. 1965.

CARL W. REUSS
Clerk of the United States Court of Appeals
for the Sixth Circuit.

(SEAL)